NO. 20150

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, JOSEPH SICA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an appeal from an order, with findings of fact and conclusions of law, of the United States District Court for the Southern District of California, entered February 24, 1965, denying the appellants' motions to vacate sentence, to vacate the order denying motions for new trial, and for the appointment of a judge other than the Honorable George H. Boldt to pass upon motions for a new trial.

The jurisdiction of the District Court rested on Title 18, United States Code, Sections 371, 875(b) and 1951, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellants' "2255 motion" pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES

The following relevant sections are found in Title 28, United States Code:

"§144. Bias or prejudice of judge.

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

"2255. Federal custody; remedies on motion attacking sentence.

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

III

STATEMENT OF THE CASE

A. Prior History of the Case.

The following material concerning the extensive prior history of the case is taken chiefly from the Government's opposition to the 2255 motions filed with the District Court [Court Transcript 59-65].[1/]

The appellants, PAUL JOHN CARBO and JOSEPH SICA, and three co-defendants (Frank Palermo, Louis Tom Dragna and Truman K. Gibson, Jr.) were indicted variously in a ten-count indictment by the Federal Grand Jury for the Southern District of California, sitting at Los Angeles, on September 22, 1959. CARBO was charged in five counts alleging violations of 18 U.S.C. §§ 371, 875(b) and 1951; PALERMO was charged in six counts alleging violations of 18 U.S.C. §§ 371, 875(b), and 1951; SICA was charged in three counts alleging violations of 18 U.S.C. §§ 371 and 1951; and Dragna and Gibson were each charged in two counts alleging violations of 18 U.S.C. §§ 371 and 1951.

Extensive pre-trial proceedings were had including the entertaining by the District Court (the late Honorable Ernest Tolin, United States District Judge) of various motions by the said appellants and three co-defendants.

The beginning of the trial was substantially delayed by the unsuccessful efforts of CARBO to obtain an order quashing the writ

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1/ Hereinafter referred to as "C.T.".

of habeas corpus ad prosequendum issued by the District Court to CARBO'S jailer in the City of New York.

Carbo v. United States, 277 F. 2d 433 (9 Cir. March 23, 1960), affirmed 364 U.S. 611 (January 9, 1961).

The trial commenced on February 21, 1961, at which time, on motion of the Government, the District Court (the Honorable Ernest Tolin) exonerated the bonds of the said appellants, CARBO and SICA, and of the co-defendants, Palermo and Dragna, and remanded them into custody in order to avoid interference by them with the orderly process of the trial. (Co-defendant Gibson was briefly committed to custody at the same time; however, the order committing Gibson was vacated by the trial judge the day it was entered.) While the trial was in progress, CARBO, Palermo, SICA and Dragna prosecuted two separate appeals in the United States Court of Appeals for the Ninth Circuit seeking to obtain reinstatement of bail prior to conviction. In the first of these appeals, this Court held that the District Court possessed the inherent power to commit the said appellants and co-defendants in order to maintain the orderly process of trial; however, this Court found that the brief record on the first day of trial did not justify the action of the District Court.

Carbo v. United States, 288 F. 2d 282 (9 Cir. March 3, 1961).

After additional evidence was adduced on the bail question in the District Court, the appellants CARBO and SICA and co-defendants

Palermo and Dragna were again denied bail by the trial court. This Court affirmed the decision of the District Court.

Carbo v. United States, 288 F. 2d 686 (9 Cir. March 15, 1961), cert. den. 365 U.S. 861 (March 27, 1961).

The trial concluded on May 30, 1961, following fourteen weeks of trial, with the jury finding the said appellants and co-defendants guilty as charged in the indictment.

After the verdicts were received, the District Court denied the pending motions of CARBO, Palermo, SICA and Gibson for judgments of acquittal and set hearing on all other motions, pending and to be filed, for June 20, 1961.

On June 11, 1961, Judge Tolin died. Thereafter, on June 26, 1961, Chief Judge Peirson M. Hall entered an order designating the Honorable George H. Boldt, United States District Judge for the Western District of Washington, to hear and dispose of any and all matters which remained to be disposed of in the case.

On July 24, 1961, Judge Boldt heard argument upon all pending post conviction motions and adjourned the case sine die for ruling thereon and for imposition of sentence (in the event the motions of the said appellants and co-defendants were denied) in order to have an opportunity to acquaint himself fully with the entire record in the case.

On October 13, 1961, Judge Boldt denied said appellants' and co-defendants' supplemental motions for new trial.

On November 28, 1961, Judge Boldt signed a Memorandum

Order setting forth his findings and tentative ruling with respect to the pending motions of said appellants and co-defendants. This Order invited all parties to submit further memoranda and oral argument if they so desired at or before the hearing on the motions, December 2, 1961.

On December 2, 1961, Judge Boldt heard further argument upon the pending motions, which motions were denied at the conclusion of argument. At this time, the District Court adopted the Government's Memorandum of Points and Authorities Concerning Certain Contentions of Error Raised by Defendants in Their Motions for New Trial "as being substantially and barring some possible suggestion of argumentation, a true analysis of the record" which conformed "entirely to my own views of it." In accordance with his Memorandum Order and his remarks in open court on December 2, 1961, Judge Boldt filed an Abstract of Testimony comprising ten volumes which summarized all of the trial proceedings. On the same date Judge Boldt sentenced the appellant CARBO to twenty years on Count One of the indictment, five years on Count Two, to run consecutively to the sentence imposed on Count One, and five years on each of Counts Five, Seven, and Nine to run concurrently with the sentences on Counts One and Three. The appellant SICA was sentenced to twenty years on Count One and five years each on Counts Four and Five to run concurrently with the sentence on Count One.

On January 22, 1962, this Court denied the motions of said appellants CARBO and SICA for bail pending appeal without prejudice

to renewal thereof after reconsideration of such motions by the District Court.

Carbo v. United States, 300 F. 2d 889 (9 Cir. January 22, 1962).

Upon reconsideration of his earlier denial of bail pending appeal, Judge Boldt again denied CARBO'S and SICA'S motions on February 5, 1962.

On February 13, 1962, this Court affirmed Judge Boldt's denial of bail pending appeal to CARBO and SICA.

Carbo v. United States, 302 F. 2d 456 (9 Cir. February 13, 1962).

On March 19, 1962, Mr. Justice Douglas denied bail to CARBO "in the public interest" and set bail for SICA in the amount of $50,000 with substantial limitations upon his conduct while at large.

Carbo v. United States, 82 S. Ct. 662, 7 L. ed. 2d 769 (March 19, 1962);

Sica v. United States, 82 S. Ct. 669, 7 L. ed. 2d 778 (March 19, 1962).

On February 13, 1963, this Court handed down its opinion relating to the merits of the various appeals (314 F. 2d 718, 9 Cir. 1963). Petitions for rehearing were denied on March 19, 1963 (314 F. 2d 718, 9 Cir. 1963).

The United States Supreme Court on June 1, 1964 denied petitions for certiorari (377 U.S. 953); and on June 22, 1964 denied petitions for rehearing of the petitions for certiorari (377 U.S. 1010).

When the mandate was issued, motions for modification of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure were made, opposed, briefed and argued; and on July 17, 1964 Judge Boldt denied said motions. As will be seen, appellants' entire subsequent motions under 28 U.S.C. §2255 were based upon a comment made by Judge Boldt at the conclusion of the hearing on these motions to modify the sentences.

Appellants SICA and CARBO, on July 23, 1964 and July 27, 1964, respectively, filed notices of appeal from the order denying the motions to modify sentences. In November, 1964, appellant SICA, acting in pro per, petitioned Honorable Thurmond Clarke for bail pending his appeal from the order denying his motion to modify his sentence. On December 16, 1964, appellant SICA, acting in pro per, wrote a letter addressed to Judge Thurmond Clarke inquiring about his motion for bail.

On December 8, 1964, the Government moved this Court to docket and dismiss the then pending appeals of CARBO and SICA. In December, 1964 appellant SICA, acting in pro per, addressed a motion to Circuit Judge Stanley N. Barnes in which he requested time to file a brief. In this motion appellant SICA stated:

> "Original 'Notice of Appeal' was instituted on July 23, 1964, by appellant's counsel in the said District Court. Said appeal was filed pursuant to a hearing had under Rule 35 Federal Rules of Criminal Procedure entitled 'Modification of Sentence.' (The contemplated appeal will not be for the purpose of questioning the

lower court's denial of the modification of sentence, but for the purpose of questioning certain prejudicial remarks made during the said hearing.).

"Thereafter appellant was transferred to his present place of confinement; Leavenworth, Kansas; the status of said appeal was unknown to appellant, assuming appellant's counsel was handling same accordingly. Upon receipt of said notice appellant was thereafter notified by counsel that the said question that was to be raised upon appeal, would be tested in the lower court under Title 28, USCA., Section 2255, which in effect would save time and expenses to both the appellant and the government.

"However, appellant seeks permission from this Honorable Court for an 'Extension of Time' to prepare a brief in the event the motion pursuant to 2255 should be unsuccessful and/or in the event the lower court has not the jurisdiction to entertain same."

On December 29, 1964, CARBO, through his counsel, advised this Court that he desired to withdraw his appeal. On January 4, 1964, the Court of Appeals for the Ninth Circuit in separate orders dismissed the appeals of SICA and CARBO. On the same date Judge Boldt in writing advised that he denied SICA'S application for bail.

B. Statement of Facts of 2255 Motions, Subjects of Instant Appeals.

On January 11, 1965, appellant CARBO, through counsel, obtained an order from Judge Thurmond Clarke setting a hearing, of CARBO'S as yet unfiled motion under 28 U.S.C. 2255, for January 25, 1965, in Courtroom Number 3 in Los Angeles, California. Then, such a motion under 28 U.S.C. 2255 was filed. Counsel sent a "courtesy copy" of the 2255 motion and a copy of the order setting a hearing to Judge Boldt. The District Court Clerk, pursuant to local rules, assigned the 2255 motion to Judge Boldt under case No. 65-40-Boldt.

On January 20, 1965, appellant SICA, through his counsel, filed three pleadings:

1. Motion Pursuant to 28 U.S.C. 2255 to Vacate and Set Aside Sentence and For Other Relief.

2. Motion and Petition Pursuant to Section 2255 of Title 28 U.S.C. to Vacate Judgment and Modify the Same Heretofore Rendered Herein as to Movant and Petitioner Joseph Sica.

3. Motion for Assignment of Judge. (This motion was addressed to Chief Judge William C. Mathes.)

On January 22, 1964, Judge Thurmond Clarke, noting that "pursuant to the established practice" that the 2255 motions of SICA and CARBO are assigned to Judge George H. Boldt for all further proceedings, continued the hearing to February 2, 1965 before Judge Boldt.

On January 22, 1965 an affidavit of Judge Boldt was filed in both cases; 65-40 Boldt (CARBO) and 65-91 Boldt (SICA).

On January 25, 1965, Chief Judge Mathes entered an order denying SICA'S motion for the assignment of a judge other than Judge Boldt.

On January 26, 1965, appellant CARBO, through his counsel, obtained an order from Judge Clarke shortening time to January 28, 1965, for a hearing before Judge Clarke on the following motions:

1. Motion to vacate Judge Clarke's order of January 22, 1965 setting the case, 65-40-Boldt, before Judge Boldt for hearing on February 2, 1965.

2. Motion that a Judge other than Judge Boldt hear case 65-40-Boldt.

The Government filed oppositions to these two motions. On January 28, 1965, Judge Clarke heard the above mentioned two motions, and at the conclusion of counsel's arguments, Judge Clarke orally denied each of the motions. On January 29, 1965 Judge Clarke signed a written order denying each of these motions.

The appellants' 2255 motions presented essentially identical claims to relief. The arguments presented may be summarized as follows.

At the hearing on the previously referred to motion to reduce sentence on July 17, 1964, an attorney representing one of the appellants' co-defendants stated:

" * * * and I personally had the opportunity of talking about this case to Judge Tolin, who is now

deceased, and I feel that your Honor, in the spirit that Judge Tolin would have treated this matter should grant this man probation and modify the judgment to cover the period of time * * * * " [C. T. 89].

Judge Boldt replied to this statement by saying:

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. And I should say that I have pretty well in mind Judge Tolin's views of the case, since we were operating at the other ends of the same hall during the same period and we quite often saw each other at lunch, and I had occasion to see Judge Tolin after the verdict in this, and before my case was concluded, and I had some ideas of his views of the case. From that I can affirm without any question whatever that the sentences I imposed, I believe, were more lenient than those that Judge Tolin would have imposed." [C. T. 80-81].

When a transcript of the judge's remarks was ordered by the appellants, the court reporter for the aforesaid hearing sent a copy of the transcript to Judge Boldt who returned it with changes as follows:

"Some reference was made by one of the counsel to a conversation with Judge Tolin concerning this case, or some remarks of Judge Tolin concerning it. ~~And~~ I should say that I have pretty well in mind Judge Tolin's

views of the case, since we were operating at ~~the other~~ opposite ends of the same hallway during the same period and we quite often saw each other at lunch; ~~and~~ I had occasion to ~~see~~ talk with Judge Tolin after the verdict in this case, ~~and~~ before my case was concluded, and ~~I had~~ received some ideas of his views ~~of the~~ after the verdict in this case." [C. T. 81, lines 22 to 32].

"~~From that~~ I can ~~say and~~ affirm without any question whatever that the sentences I imposed~~, I believe,~~ were more lenient that those ~~that~~ Judge Tolin ~~would~~ might have imposed." (words deleted are crossed out, thus: ----, and words added are underlined, thus: _____.) [C. T. 82, lines 1-6].

In Judge Boldt's affidavit filed on January 22, 1965 [C. T. 30-32], the judge clarified his comments from the bench. The affidavit states that Judge Boldt felt that Judge Tolin considered the appellants' offense as extremely serious, not because of any statements made by Judge Tolin to him, but because of the fact that Judge Tolin had appeared to him during the time of the trial, like a man laboring under a heavy burden. Judge Boldt stated that his impressions of Judge Tolin's feelings played no part whatsoever in his rulings or the sentences he imposed, but that he relied solely on a meticulous consideration of the transcript. Judge Boldt added that he had not been a close acquaintance of Judge Tolin, that he had never met with Judge Tolin alone during the course of the appellants'

trial, and that he never had any conversation whatsoever with Judge Tolin concerning the evidence, rulings, questions of law, or possible sentence in the instant case.

The appellants' 2255 motions argued that contrary to Judge Boldt's sworn affidavit the possibility remained that Judge Boldt may have received some information from his predecessor on the case, and that such information would be "coram non judice", entitling the appellants to relief. The appellants also argued that the possibility of the above required that a different judge consider the 2255 motion and that Judge Boldt consent to being a witness at the 2255 hearing.

The hearing on the 2255 motions took place on February 2, 1965, before Judge Boldt. In the course of the hearing, counsel for the appellant CARBO admitted that the appellants had not complied with the requirements of Title 28, United States Code §144 in requesting the replacement of Judge Boldt [C. T. 5-6].

Judge Boldt heard lengthy argument by counsel for the appellants and the Government, which in large measure were repetitious of those matters previously presented in the pleadings. Judge Boldt then denied appellants' motions that he be disqualified [C. T. 29].

Only one witness testified at the hearing; namely, Samuel Goldstein, the court reporter who had recorded Judge Boldt's statement of July 17, 1964, concerning Judge Tolin's "views" toward sentence of the appellants and their co-defendants. Mr. Goldstein, subpoenaed by appellant CARBO, testified that he sent

a transcript of the July 17, 1964, proceedings to Judge Boldt pursuant to the judge's request. Shortly thereafter, Judge Boldt returned the transcript with the changes discussed above [Reporter's Transcript 30-52]. 2/

Following Mr. Goldstein's testimony, counsel for appellant CARBO requested the opportunity to address certain questions to the Court. These questions appear in Appendix B of both appellants' briefs. All the questions concerned Judge Boldt's July 17 reference to Judge Tolin's views. The Court examined the questions. Judge Boldt commented with respect to questions 15 through 19 that it was his practice to review transcripts for the purpose of correcting grammar, stenographic errors, eliminate repetition, and clarify his statements. Judge Boldt stated:

> "All that I think it is necessary to say on any of the balance of these questions 1 through 26 has already been said by the affidavit which I have filed in this proceeding.
>
> "Now, I want to make it plain that I could have made that statement solely on my affirmation as a United States District Judge; and I suspect it would have had exactly the same significance, weight and value. But in order to emphasize that it was carefully and thoroughly prepared with a view to stating the exact and complete and unqualified truth, I made it in affidavit form. That

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2/ Hereinafter referred to as "R. T. ".

statement, in my judgment, fully and thoroughly disposes of any conceivable fact question that could possibly have any bearing upon the pending motions 2255 in this proceeding.

"For these reasons I decline to be sworn as a witness, or to be interrogated further by you or any other counsel in the matter." [R. T. 58, lines 8-24].

Judge Boldt closed the hearing with a concise statement as to the merit of the 2255 motions.

"It appears to me indisputably shown that there is not the slightest basis in fact for the contentions made in the Carbo and Sica motions under 28 USC 2255. And I further find and hold that, assuming any possible interpretation of my July 17, 1964 remarks most favorable to petitioners' contentions, they are without merit and have no substantial basis in law.

"In my opinion these motions are so meretricious in both fact and law as almost to reach the point of being frivolous. The long delay in presenting these contentions casts some doubt upon their bona fides. No application for change of judge has been made or attempted in the only way authorized by law, namely, under 28 USC 144.

"In these circumstances and considering the vast amount of thought, time and effort expended in safeguarding the defendants' rights in this litigation -- a large part of

which was contributed by me, I dare to say, above and beyond the call of duty in some respects -- it is difficult to believe that the motions now presented are made in full candor and in good faith.

"In any event, each and all of the several contentions and the several motions in each of the Carbo and Sica petitions under 28 USC 2255 are now and hereby denied. It is so ordered.

"Recess, subject to call." [R. T. 75, lines 7-25; 76, lines 1-6].

On March 9, 1965, the Findings of Fact and Conclusions of Law and Judgment pertaining to the 2255 motions were filed [C. T. 79-85 (Carbo); 116-122 (Sica)]. The Conclusions of Law were stated as follows:

"1. There is no basis in fact and in law to disqualify Judge Boldt from ruling on petitioner's motion under 28 U. S. C. §2255.

"2. There is no basis in fact or in law to support this petition.

"3. The doctrine of coram non judice has no factual or legal application to this matter.

"That the petition must be denied." [C. T. 82-83; 119-120].

Thereafter the instant appeals were initiated.

IV

SUMMARY OF ARGUMENT

1. Since the doctrine of coram non judice has no factual nor legal application to the appellants' case, their claim for relief based on said doctrine is without merit.

2. The issue raised by the 2255 motions is so baseless as to approach the frivolous, since the appellants did not comply with the requirements of Section 144 of Title 28, United States Code, in regard to seeking Judge Boldt's replacement, and since under Section 2255 of Title 28, United States Code, Judge Boldt was the proper judge to consider the 2255 motions; therefore, the appellants' contention, that Judge Boldt's presiding at the 2255 hearing and Judge Boldt's declining to testify at said hearing deprived the appellants of due process of law, is without merit.

3. The record of the instant 2255 motions in the District Court does not contain any factors which can be considered to give even the appearance of unfairness to the appellants.

V

ARGUMENT

A. SINCE THE DOCTRINE OF CORAM NON JUDICE HAS NO FACTUAL NOR LEGAL APPLICATION TO THE APPELLANTS' CASE, THEIR CLAIM FOR RELIEF BASED ON SAID DOCTRINE IS WITHOUT MERIT.

The briefs for both appellants have approached the merits of the appeal in what would appear to the Government to be a totally illogical manner; namely, both briefs first present the arguments concerning the alleged deprivation of due process because of Judge Boldt's presiding at the 2255 hearing and the Judge's refusal to testify at the hearing, and only then do the briefs turn to the heart of the matter, the merits of the 2255 motions. It is only reasonable to first examine the only basic issue of the appeal, which, as previously stated, is the argument that Judge Boldt may have talked with Judge Tolin in regards to the case and that Judge Boldt may have received information coram non judice which he relied upon in his rulings and sentence, and that the appellants have therefore allegedly been deprived of liberty without due process of law. It is the Government's contention that the ancient maxim of coram non judice has no legal nor factual application to the instant case; that the appellants' claim for relief has no basis; and that because of this fact the questions of the replacement of Judge Boldt and calling the judge as a witness must be recognized as empty and meaningless.

According to Black's Law Dictionary (4th Ed. 1951, p. 406)

the phrase coram non judice means: "In presence of a person not a judge. When a suit is brought and determined in a Court which has no jurisdiction in the matter, then it is said to be coram non judice, and the judgment is void."

Several of the cases cited in the appellants' briefs (it is to be noted that the appellant Sica's brief adopts in toto the argument on this, the essential question, from the appellant Carbo's brief) appear to give the aforesaid phrase a different meaning, namely, "of extrajudicial origin". However, the phrase when so used is utilized to distinguish the difference between a personal bias and a judicial bias. Thus, if a judge has a point of view in a case that is derived from the evidence, then it is a judicial and not a personal bias.

There is not, however, any such equation in the law as that the appellants urge, to the effect that if a judge knows anything about the matter before him that was derived from sources outside the courtroom, he is automatically disqualified from sitting on the case. The appellants recognize that judges are treated differently in this area from jurors and that the courts have not felt that a judge requires the same degree of insulation from outside influences as the impressionable layman serving on a jury. The appellants have not, however, fully appreciated the real difference in the treatment of the courts in regard to judges and juries, a difference based on the extremely lessened need for active protection of a defendant's rights, because of the enormously lessened possibility that a judge would be influenced by outside sources, as

opposed to the possibility of a juror being influenced. As an example, it should be noted that to the knowledge of the Government, no case has ever been reversed because a trial judge was exposed to pre-judicial newspaper publicity, while numerous cases have been reversed because of the possible effect of newspaper publicity on jurors.

Assuming, for purposes of argument, that Judge Boldt did have an exchange of views with Judge Tolin concerning this case, there is no possibility of prejudice to the appellants since, as the record establishes Judge Boldt fully familiarized himself with the evidence in the case prior to denying the motions for a new trial and for reduction in sentence.

On December 2, 1961 in sentencing the appellants, Judge Boldt made a statement which sheds light on not only the efforts he made to inform himself as to the evidence in the case but also as to his basis for deducing Judge Tolin's feelings in regard to the case.

> "In that connection perhaps I should also say that Judge Tolin's immediate, prompt, emphatic denial of the motions for acquittal of all the defendants, except that of DRAGNA, within a very short time of the reception of the verdict and in the same session, and what he said at that time concerning pre-sentence reports and the like, coupled with my own analysis of the record in this case, makes it clear to me that Judge Tolin had not the slightest doubt of the guilt of any of the defendants, or of the

credibility of the principal witnesses, at least insofar as the particulars of the offenses charged in this case are concerned, and also that he had not the slightest thought or remotest intention of granting a new trial on a discretionary basis.

"The whole record and my own analysis of it reflects this, and I am utterly confident that were the late Judge Tolin sitting here now in this place instead of myself he would as readily, or perhaps even more readily, have denied all of the pending motions of the defendants.

"In all probability he would not have spent five months, as I have had to do, giving some part of almost every day of that time to the enormous task of reading, studying the record, analyzing it with respect to each and every specific claim of error made by the defendants.

"I say this without claiming any special merit for it, but I do say it with the utmost sincerity and on my honor as a United States judge, that every single point listed, however trivial, has been considered and examined with the result stated in my memorandum order of November 28th. . . . " [C.T. 70, lines 11-32; 71, lines 1-12].

This Honorable Court, in affirming the case, referred to Judge Boldt's steps taken to familiarize himself with the evidence.

"This conclusion with respect to the substance of the corroborating evidence was reiterated from the bench at the time of imposing sentence. At that time Judge Boldt also expressed his conviction, based upon actions and words of Judge Tolin, that Judge Tolin 'had not the slightest doubt of the guilt of any of the defendants or of the credibility of the principal witness.'

"In the exercise of his discretion Judge Boldt has, in our view, concerned himself with the vital question. He has concluded, after most careful and conscientious study, that the corroboration Leonard and Nesseth received from other convincing evidence placed the government's case safely beyond demeanor impeachment and that Judge Tolin himself had not been disturbed by questions of credibility. His determination in this latter respect is reinforced, to some extent at least, by Judge Tolin's charge to the jury. He warned them to discount the effect fear and the courtroom atmosphere might have on witnesses and emphasized the virtue of appraising testimony by the manner in which it successfully integrated with other evidence.

"We do not find abuse of discretion in the action of Judge Boldt in proceeding, as successor judge under Rule 25, to the completion of the judicial proceedings in the district court." [Carbo v. United States, 314 F. 2d 718 (9 Cir. 1963) at 750].

In the face of this record, the appellants do not contend that Judge Boldt relied to any great degree on information received directly from Judge Tolin, in making his rulings, but maintain that even if Judge Boldt was completely familiar with the evidence the fact that he heard his predecessor's views in a conversation outside the courtroom would serve to disqualify him and would deprive the appellants of due process. It should be noted that at no point do the appellants allege that Judge Tolin received any information extra judicially. Thus the only information that Judge Boldt could have possibly obtained from Judge Tolin would have been limited to the same material that appeared in the files and records of the case, independently examined by Judge Boldt, and Judge Tolin's opinions or views of the evidence. Judge Boldt could not have been exposed to any new evidence.

To apply the appellants' theory, particularly in the instant case, where neither Judge Tolin nor Judge Boldt was the trier of fact, would be to misconceive the nature and function of a judge and would be in total disregard of the weight to be given a judge's oath. It would also create a totally impractical situation requiring a revolution in the operation of our courts. Accepting the appellants' theory would apparently lead to the conclusion that if Judge Tolin had heard Judge Boldt's views on the case Judge Tolin would have been disqualified from further handling of the case. A judge would also be prohibited from discussing a case with his law clerk or with his own wife.

Needless to say, a judge will often have post-trial extra-

judicial sources of information at his disposal in sentencing a defendant, such as a probation officer's personal observations. In many instances, as in the present case, the trial court delays ruling on motions for a new trial until the day set for sentencing. The judge, on the day of his ruling on the motions for a new trial, will possess all the information in the probation reports, derived from extra-judicial sources, information vital to the determination of a proper sentence. Adoption of the appellants' position would obviously lead to an undesirable and impractical situation, cutting off such sources of information.

The Government maintains that the appellants have not cited one relevant case in support of their position. This statement is made despite the fact that the appellants' argument is loaded with numerous case citations. Close examination of the opinions in the cited cases reveals their total inapplicability.

The appellants quote certain language from In re Federal Facilities Realty Trust, 140 F. Supp. 522 (N.D. Ill. 1956) at page 25 of the Carbo brief. In this case, the judge in question had undertaken corporate reorganization and settlement proceedings and in connection therewith had determined that the appointed trustee should be surcharged. Later the same judge was required to adjudicate the division of gains. The trustee intervened, petitioning for a portion of the gains to be divided. The trustee then charged the judge by affidavit with prejudice and bias towards him. The affidavit was rejected by the same judge as insufficient in law to invoke the action contemplated by Section 144 of Title 28,

United States Code, since whatever opinions the judge had of the trustee were derived coram judice. It may therefore be seen that the factual situation and holding have no relevance to the instant case, except to the extent that it provides authority against the appellants, requiring compliance with Section 144. These aspects of the case will be discussed more completely under the second point of argument.

The case of Irvin v. Dowd, 366 U.S. 717 (1961), is also cited by the appellants [pages 25, 26, Carbo Brief]. In this case, the Supreme Court reversed a conviction on the basis that inflammatory newspaper publicity had deprived the defendant of a fair trial because of the possible effect on the jury. At no point in the opinion is there any reference to the possible effect of such publicity on the judge who supervised the trial of the case.

Craven v. United States, 22 F. 2d 605 (1 Cir. 1927), merely holds that a judge who presided at a trial, which ended in a mistrial (hung jury), was not prevented from presiding at the second trial, since any bias was not personal but judicial, i.e., derived from the evidence (coram judice) and not of extra-judicial origin (coram non judice). Again the case is, if anything, against the appellants in that the action was brought under the predecessor to Section 144 of Title 28, by affidavit of the defendant, as has not been done in the instant case.

The main case relied upon by the appellants and put forward by the appellants as most analogous to the present case is Smith v. United States, 360 U.S. 1 (1958).

This case involved application for vacation of sentence under 28 U.S.C. 2255. The defendants had originally waived venue, counsel, and indictment, and the Government proceeded against them by way of information charging interstate transportation of a kidnapped person. Prior to the entry of guilty pleas by the defendants, the judge had a private conference with the FBI agent who had interviewed the defendants immediately after their apprehension. The subject of the interview pertained to the question of possible sentence of the defendants.

The judgment and conviction were reversed with instructions to dismiss the information on the ground that the United States Attorney had no authority to file an information. The offense was said to require proceeding by indictment, therefore the waiver was not binding and did not confer power upon the trial court to hear the case.

Justices Clark, Harlan, and Stewart joined in a separate opinion -- concurring in part and dissenting in part. It was said that in a criminal case, a private conference by such an agent with the judge must be deemed presumptively prejudicial as a violation of Rule 32(c)(1), Federal Rules of Criminal Procedure. This rule provides that the presentence report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty. These justices invoked the rule of McNabb v. United States, 318 U.S. 332 (1943), stating that the court's duty of supervision required reversal of the conviction.

Even this separate opinion provides no support to the

appellants' position. The reasoning of the separate opinion indicates that the Justices joining in that opinion would not have objected to the trial court's receiving such information from an FBI agent after plea had been entered, although such information would be from an extra-judicial source. The critical factor under Rule 32(c)(1) is not the source of the material in question but the time when the information is received, namely before or after the verdict. The cases interpreting Rule 32 clearly hold that a judge is not barred from relying on probation reports in sentencing even though the defendant has not had the opportunity to examine the probation report.

> Friedman v. United States, 200 F. 2d 690 (C. A. Iowa, 1953), cert. den. 345 U.S. 926;
>
> United States v. Durham, 181 F. Supp. 503 (D. C. D. C., 1960).

The case of McFadden v. United States, 63 F. 2d 111 (7 Cir. 1933), also cited by the appellants involved a court trial in which the presiding judge, the trier of fact, received evidence, extra-judicially, of a conclusively incriminating nature. Since this evidence was received by the trier of fact apparently prior to the trial the reversal of the judgment is unremarkable. In the instant case, Judge Boldt was not the trier of fact, to note only one of the major differences between the cases.

The appellants cite Stewart v. United States, 366 U.S. 1 (1960). An examination of the facts and holding in this case can only result in complete mystification as to its inclusion in the

appellants' brief. In this case a defendant was undergoing his second retrial. His only defense was one of insanity. The defendant testified for the first time in this second retrial. On cross examination the prosecutor asked the defendant whether this was not his first time on the stand.

The conviction was reversed on the theory that the jury might have considered that the fact that defendant had not taken the stand before suggested the possibility that his meaningless testimony at the trial was feigned to deceive the jury into thinking defendant was in fact insane. The prosecutor's question was therefore held to be prejudicial, even though actual prejudice based on the inadmissible information was not capable of being shown.

The remainder of the cases cited by the appellants, including Tumey v. Ohio, 273 U.S. 510 (1927), involving a financial interest by the trier of fact in the outcome of the case, and Payne v. Arkansas, 356 U.S. 560 (1958), involving a jury's hearing evidence as to a coerced confession are equally irrelevant, and are so different from the instant case in their factual background and legal issues as to provide no support for the appellants' contentions.

Even if there were any basis for the legal theories suggested by the appellants, the fact remains that there is, contrary to the impression the appellants seek to create, no evidence that Judge Boldt ever received any information extra-judicially from Judge Tolin concerning this case. The unaltered transcript of Judge Boldt's comments from the bench on July 17, 1964, does not contain any reference to any such conversation concerning the case [C. T.

80, 81]. Needless to say, Judge Boldt's sworn statement of January 21, 1965, prepared after the Judge had the opportunity to scrutinize his memory as to his contacts with Judge Tolin, in which the judge flatly states that he never discussed the " * * * any evidence, procedure, issue or ruling * * * " involved in the present case and that any impression he had of Judge Tolin's views played no part in his rulings in the case should completely dispose of this issue [C. T. 31].

Since, as the lower court's judgment stated, the 2255 motions were supported neither in fact nor in law and since the doctrine of coram non judice has no application to this matter, the judgment of the District Court must be affirmed.

B. THE ISSUE RAISED BY THE 2255 MOTIONS IS SO BASELESS AS TO APPROACH THE FRIVOLOUS, SINCE THE APPELLANTS DID NOT COMPLY WITH THE REQUIREMENTS OF SECTION 144 OF TITLE 28, UNITED STATES CODE, IN REGARD TO SEEKING JUDGE BOLDT'S REPLACEMENT, AND SINCE UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE, JUDGE BOLDT WAS THE PROPER JUDGE TO CONSIDER THE 2255 MOTIONS; THEREFORE, APPELLANTS' CONTENTION, THAT JUDGE BOLDT'S PRESIDING AT THE 2255 HEARING AND JUDGE BOLDT'S DECLINING TO TESTIFY AT SAID HEARING DEPRIVED THE APPELLANTS OF DUE PROCESS OF LAW, IS WITHOUT MERIT.

The only issue raised by the appellants' 2255 motions, the question as to the possibility of Judge Boldt's receiving information coram non judice from Judge Tolin has been examined in detail under the preceding section of the argument. For that reason, the Government's position will not be repeated at this point. In essence, if this Court accepts the Government's position, which was the view of the District Court, that this issue is so baseless as to approach the frivolous, the appellants' accompanying allegation of error concerning Judge Boldt's presiding at the 2255 motion, which derives its very existence from the coram non judice argument, must be considered as not worthy of independent examination. If this position of the Government is adopted, this secondary argument merely becomes a branch of a tree which has died. The branch has no independent existence of its own.

The position of the appellants is further untenable for the

reason that the motion to disqualify Judge Boldt, which was denied by Judge Boldt, was clearly insufficient in law.

In the first place Judge Boldt, as the successor to the trial judge, was the proper judge to consider 2255 motions made by the appellants. As the Court of Appeals for the Fourth Circuit pointed out in Carvell v. United States, 173 F. 2d 348 (4 Cir. 1949), in passing on a complaint that the trial judge should not have been the judge who passed on a 2255 motion, "It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that Section 2255 of Title 28 was inserted in the Judicial Code."

If the appellants felt there were circumstances in the instant case which made it inappropriate for Judge Boldt to hear the 2255 motion there was a precisely defined manner to bring the problem to the fore. The way in which this should have been initiated, the only way it could properly have been initiated, was to have followed the steps clearly outlined by Section 144 of Title 28, U.S.C. This statute, completely set out in the statute section of this brief requires that the defendant file with the District Court a detailed affidavit executed by that defendant stating the facts and reasons for the belief that bias and prejudice exists on the part of the judge. The statute also requires that the affidavit be accompanied by a certificate of counsel of record that the affidavit is made in good faith.

In the present case the files before this Court do not contain such affidavits made by the appellants Carbo and Sica, nor

certificates by their counsel. No such affidavits or certificates were ever filed in the District Court. The attorney for the appellant Carbo acknowledged at the 2255 hearing that Section 144 had not been complied with by either himself or his client [R. T. 5].

While Section 2255 and the cases interpreting it cover a great deal of territory, it is not the all encompassing umbrella that the plaintiffs would like to make it. Section 2255 is not the proper approach or procedure to disqualify a judge. The only authorized procedure to be utilized to disqualify a judge in Federal Court in Section 144. The cases demanding a strict following of the requirements of Section 144 are legion. As the Fifth Circuit stated in Beland v. United States, 117 F. 2d 958 (5 Cir. 1941) at 960: "The courts have held that compliance with its every provision is essential * * * * . The orderly administration of justice requires that affidavits filed under the statute be strictly construed so as to prevent abuse, and that they state facts, not baseless conclusions, showing personal bias or prejudice of the judge against the affiant."

See also:

Wilkes v. United States, 80 F. 2d 285 (9 Cir. 1935);

Hurd v. Letts, 152 F. 2d 121 (D. C. Cir. 1945);

United States v. Pendergast, 34 F. Supp. 269 (D. C. W. D. Mo. 1940).

In the instant case there is not even an affidavit to construe. There is a total and complete failure of compliance with the statute. If, however, the information contained in the 2255 motions had

been put in affidavit form and the other procedural steps of Section 144 had been complied with, the motion to relieve Judge Boldt would still have lacked merit, since there were no facts presented which would indicate the bias and prejudice on the judge's part which must be stated in order that the affidavit be sufficient.

Hurd v. Letts, supra.

Wilkes v. United States, supra.

Under Section 144, it should be noted, Judge Boldt would have had the duty to pass initially on the timeliness and sufficiency of the motion to disqualify him.

Willenbring v. United States, 306 F. 2d 944 (9 Cir. 1962);

Taylor v. United States, 179 F. 2d 640 (9 Cir. 1950);

Price v. Johnston, 125 F. 2d 806 (9 Cir. 1942).

Since counsel for the appellants are obviously familiar with existence of Section 144 and its requirements, it appears remarkable to the Government that there has at no time been even an attempt at compliance. Perhaps this strange void is due to a misconception of counsel as to the meaning of the terms bias and prejudice in their legal sense. Perhaps counsel for the appellants connote bias and prejudice with feelings of animosity, and recognizing that such animosity could not be established, disregarded Section 144.

If counsel for the appellants had closely examined one of the cases they cited in support of their own position, they would have realized the fallacy of such a notion. The appellants strongly

rely on the case of In re Federal Facilities Realty Trust, 140 F. Supp. 522 (N. D. Ill. 1956), a case which involves the claim that a judge received information coram non judice. As the opinion notes (at 526) if a judge actually determined a case not on the evidence, but on the basis of material received coram non judice, we would be presented with an example of the "personal prejudice" that the statute in question, Section 144, was designed to guard against. In such a situation (a situation as the appellants claim to exist in the present case) this decision indicates that Section 144 would be the proper and only avenue for the complaining party to take in order to obtain disqualification of the trial judge.

While one of the cases cited by the appellants actually provides this authority for the Government's position, the other cases cited in this assignment of error merely provide material useful only in refreshing one's memory as to areas of law not involved in the instant case. One of the two cases most strongly put forward is In Re Murchison, 349 U.S. 133 (1955), the noted contempt case involving the one-man-judge grand jury. In that case the Supreme Court was rightly disturbed by a situation where the judge was in effect the witness, the judge, and the jury. In Murchison, the judge who was the trier of fact, who determined the guilt or innocence of the defendant in regard to the contempt charge, was also the witness to the defendant's actions in a proceeding closed to the public, which were the basis for the contempt charge. Such a situation was so alien to the Court's sense of justice, to the spirit of our legal system, and to the basic require-

ments of due process that not even the broad powers of contempt allowed judges in our system could sustain such a conviction. How such a Star Chamber proceeding has any relevance to this case is not revealed by the appellants' argument.

The other case relied upon by the appellants is also from the contempt field; namely, Offutt v. United States, 348 U.S. 11 (1954). In that case, a trial judge held a defense counsel guilty of contempt even though the judge himself had displayed personal animosity and lack of judicial restraint. Under such circumstances, it was the view of the Supreme Court that the behavior of counsel could not be considered apart from the conduct of the judge. Therefore, the Court, in the exercise of its supervisory authority over the Federal Courts, set aside the contempt conviction and directed that the contempt charge should be retried before a different judge. It does not appear that the appellants contend that Judge Boldt conducted himself in a completely unjudicial manner as the judge in Offutt.

Again, examination of the facts and legal problems of the cases cited by the appellants establishes that the appellants' allegation of error is ill-founded, that the appellants were not deprived of due process, and that the judgment of the District Court should be affirmed.

C. THE RECORD OF THE INSTANT 2255 MOTIONS IN THE DISTRICT COURT DOES NOT CONTAIN ANY FACTORS WHICH CAN BE CONSIDERED TO GIVE EVEN THE APPEARANCE OF UNFAIRNESS TO THE APPELLANTS.

Appellants' briefs contain a third allegation of error, i.e., that an examination of the record of the proceedings before the District Court presents at least an appearance of unfairness to the appellants. This is not really an independent error, since its basis is the same as the preceding assignments of error, i.e., that since it is claimed Judge Boldt received information from Judge Tolin coram non judice, and since Judge Boldt did not disqualify himself, and did not consent to submit himself to examination by counsel for the appellants, the case has the appearance of unfairness to the appellants.

Insofar as this last assignment of error merely presents a repetition of the appellants' arguments on the other assigned errors, the Government will not repeat in detail the counter arguments presented previously.

The Government concurs in the appellants' view that the administration of justice must not only be fair, but must also present the appearance of fairness. The demands of justice and the cases cited in the opening briefs make this fact indisputable. The Government, however, strongly rejects the contention that there is anything about this case which presents even the appearance of unfairness.

Briefly, the appellants contend Judge Boldt received information from Judge Tolin. In order to find some support for this charge the appellants have seized on Judge Boldt's rather vague statements from the bench made at the time he denied the motions for reduction of sentence. The judge's remarks, examined under the earlier sections of this argument do not state that Judge Boldt discussed the facts of this case with Judge Tolin. Lest any doubt remained as to what occurred between the judges, Judge Boldt's sworn affidavit, previously discussed, emphatically states that not only did Judge Boldt not discuss the case with Judge Tolin, but that any opinion Judge Boldt may have received from Judge Tolin's appearance played no part in the successor judge's rulings.

In effect this Honorable Court is faced with an unsubstantiated charge in the coram non judice issue. From this frivolous allegation of error, the appellants developed the companion allegations of error including the charge that the District Court proceeding possessed the "appearance of unfairness". Since the appellants have intentionally and completely failed to comply with the provisions of Title 28, Section 144, the only avenue provided by law for seeking Judge Bold's disqualification, the District Court's determination of the issue cannot be considered to appear unfair. If anything, one's sense of patience is tried by such an attempt to build a molehill into a mountain in a desperate effort to obtain relief. Such an unwarranted and unbased attack on the District Court should be rejected by this Honorable Court.

VI

CONCLUSION

For the reasons stated, it is submitted that the District Court's order denying appellants' motions under Title 28, United States Code, Section 2255, should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

/s/ ROBERT L. BROSIO
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